

Responses to Epstein

I.

Professor Epstein's critique centers around a conflict between the "moral certainty" behind civil rights laws and doubts about their economic efficacy.¹ It is a critique that would not impress Ms. Rosa Parks. After all, the back of a bus is only a few feet from the front. It arrives at the same time and performs the same function of delivering the worker to the job. Why then should Ms. Parks have put herself and her neighbors to the expense and discomfort involved in the Montgomery boycott of 1955? Only, according to Epstein, if she was challenging the combination of bigotry and the coercive power of the state. If she was challenging private custom standing alone, she was in error because market forces would make private discrimination unimportant. Epstein's distinction is illusory. The state was implicated in the bus operation. Legislation that granted limited liability and permitted concentration of capital cut off the personal responsibility the common law recognized. The power of the state to grant immunity from personal liability is implicated in every corporate transaction. Our "free market" is a creature of this exercise of state power.²

Professor Epstein's critique of the civil rights laws fails on the two points made in the preceding paragraph. He does not recognize interests in personal dignity, and therefore cannot perceive the civil rights laws as precisely what they are called, "rights" laws.³ Rather, he treats them as welfare laws, and faults them for not protecting the weak. Second, he does not recognize that all transactions in the corporate form involve an exercise of the power of the state, and therefore are subject to the political process. These constraints may

1. This comment responds to Epstein, *The Paradox of Civil Rights*, 8 YALE L. & POL'Y REV. 299 (1990), [hereafter *Paradox*], which is in part a comment on my article, *Society in Transition I: A Broader Congressional Agenda For Equal Employment—The Peace Dividend, Leap Frogging and Other Matters*, 8 YALE L. & POL'Y REV. 257 (1990).

2. This analysis puts to one side the licensing of the bus company to use public streets, the law or custom that forced Ms. Parks to the back of the bus, and common and constitutional law that permitted that practice.

3. His exceptions for "force or fraud," unless carefully confined, could encompass as much discrimination as was reached by Chief Justice Burger in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

call at one time for freedom of contract, and at another for restrictions on the abuses of such freedom. It is the function of the political process to make those judgement calls. That process, incidentally, comes closest to his professed principle of treating every person as of equal value.

By looking at the Civil Rights Act as if it were an exercise in welfare economics, he misses the point that Rosa Parks understood. The perspective of the Civil Rights Acts is not that of welfare. It is far more conservative than a quest for an increased share of national income for a particular segment of society. It remains a quest for individual and collective dignity—concepts Epstein has difficulty in converting to dollars. He shares this difficulty with most economists. That is why they prefer to look at income as the primary measure of minority advancement and at money income in general as the measure of social welfare.

Without denigrating this approach, my preference is to look at minority occupational distribution in comparison to that of the white labor force. That preference is based on the premise that dignity in our time and society for both individuals and groups is heavily influenced by occupational position. We are an employee society. As long as most minorities were labor and service workers, dignity did not flow to either individuals or the group. This divergence in emphasis means that Heckman and Verkerke, whose work I admire, can say that "black economic progress" stopped in mid 1970's, by focusing on incomes,⁴ while I can say that it continued through the 1980's, by focussing on occupational distribution. My analysis does not assume that black incomes are identical to white incomes in each wage category, as Epstein suggests, because data exists from which the inferior black wage structure can be identified. Using this data, I observed that, for the year 1980 alone, the net increase in minority wages was nearly \$9 billion, taking into account majority/minority wage differences, over the income that would have gone to minorities under the occupational distribution of 1965.⁵

4. Heckman and Verkerke, *Racial Disparity and Employment Discrimination Law: An Economic Perspective*, 8 YALE L. & POL'Y REV. 276, (1990), [hereafter *Racial Disparity*].

5. Blumrosen, *The Law Transmission System & The Southern Jurisprudence of Employment Discrimination*, 6 *Indus. Rel. L.J.* 313, 333-338 (1984).

Professor Epstein insists on preserving white advantage in the name of welfare economics precisely because he does not value dignity interests. He assumes that Whites have no interest in the dignity accorded to Blacks.⁶ But the Civil Rights Acts reflect idealistic and practical considerations behind the importance that Whites attach to black dignity, considerations that required an improvement in minority status.⁷

His other point is that anti-discrimination laws have not functioned as welfare laws, benefiting the poorest. Rather, they have benefited the better prepared, "leaving those at the bottom to fend for themselves in the welfare system and the unemployment rolls."⁸ Once again, the concept of dignity has eluded him. The patterns of discrimination discounted the talented as well as the non-talented; therefore the Civil Rights Act protects both. Of course, Title VII has not benefited the poorest and least prepared among the minority labor force. Employers have never been required to hire unqualified workers, as measured by non-discriminatory standards. We have not attempted to place on employers all the costs of inadequate schooling and atrocious social conditions. Title VII is far more market-oriented than that; it does allow the employer to "cream" the minority labor force just as it may cream the white labor force.

The function of Equal Employment Opportunity laws has changed since 1964. The initial function was to break down the discriminatory barriers that were either overt or implicit in so called neutral standards. The second function then was to institutionalize fair employment practice programs within large employers. This was successfully done, largely through the Executive Order program, in the 1970s. These fair employment practices continued to operate in the face of the opposition of the Reagan administration. The function of the civil rights law now is to enforce commonly accepted standards of reasonable behavior on employers. In this

6. *Paradox*, *supra* note 1 at 305.

7. "It has been said that the bill [the Civil Rights Act of 1964] discriminates in favor of the Negro at the expense of the rest of us. It seeks to do nothing more than to lift the Negro from the status of inequality to one of equality of treatment. To the extent that this deprives any of the rest of us of anything, it is intended to deprive us of the power to treat him as a lesser and unequal American. Such a power is not ours as of right, either as Americans or as children of God." Senator Muskie, at the close of the debate on the Civil Rights Act, 110 CONG. REC. 14,328 (1964).

8. *Paradox*, *supra* note 1, at 312.

light, the drive of the proposed Civil Rights Act of 1990 toward conventional tort remedies can be better understood.⁹

The fact of the matter is that we have a black labor force that has a relatively affluent component because of the very civil rights law to which Professor Epstein objects. All he says about that is that the issue of the role of the civil rights laws is unproved.¹⁰ On this issue, the Heckman and Verkerke article is most useful. It grapples with the difficult question of "social causation"—of developing a connection between the civil rights laws and improved economic conditions of minorities.¹¹ I think that Heckman and Verkerke are more worried than necessary about the proof process involved in the choice between "continuous change," which credits general economic conditions, and "discontinuous", which credits federal EEO law. The opponents of the view that the law was a significant contributor to the change cannot meet a burden of persuasion which arises from the combination of the timing of improvement in minority employment and Heckman and Payner's specific study of the South Carolina textile and apparel industry, which effectively refuted alternative explanations.¹²

When Heckman and Verkerke say, "only evidence concerning the effects of *specific* policies can guide policy formulation"¹³ they may unduly deny utility to economists' insights. Specific legal programs almost always work in conjunction not only with one another, but with a wide constellation of other events and activities, thus defying separate analysis. Legal, economic and social systems cannot be separated in assessing a legislative program that would not have been adopted unless a significant portion of society was prepared to accept it. Therefore, it is not possible to separate out the effect of the law from the sentiment that led to its adoption. The question is what to do in the absence of the kind of precision that they would prefer. The answer may lie in the cumulation of individually identified experiences. In the days before "anecdotal" evidence was considered inferior, experience was said to be a useful mentor. Where statistics will not help, we may be forced to rely on experience once again.

9. I agree with Heckman and Verkerke that future minority advances will depend more on factors beyond the immediate control of the employer, and hence beyond the reach of Title VII.

10. *Paradox*, *supra* note 1, at 301.

11. *Racial Disparity*, *supra* note 6, at 286-90.

12. Heckman & Payner, *Determining the Impact of Federal Antidiscrimination Policy on the Economic Status of Blacks: A Study of South Carolina*, 79 AM. ECON. REV. 138 (1989).

13. *Racial Disparity* *supra* note 6, at 291.

And this leads to the most interesting aspect of Professor Epstein's criticism of my article—his objection to my "mischievous" encouragement of the civil rights movement to meddle in areas they have traditionally left alone. Prof. Epstein might have been pleased that I recognized that there are economic forces beyond the control of individual employers that limit the capacity of Title VII to improve opportunities for minorities and women. But I get no credit for this insight, because I then suggest that the civil rights movement might try to influence these forces. Professor Epstein's objections are predictable. The market will be interfered with, distributional gains will be nullified, political bitterness will occur. He argues we should not "court political turmoil in order to retard economic development."¹⁴ This, of course, is a most political statement.

In the end, there is no paradox of civil rights. Those with newly recognized rights always press those rights to their limits. Society, partly through the legal system, will struggle to identify those limits. In retrospect, the concerns about affirmative action, reverse discrimination and productivity will be viewed as part of the process of adaptation of claims to equality within our legal, economic and social arrangements. What has been lost is the apparent security of settled conditions in which minorities and women knew their place. In exchange, we have an era of uncertainty, which is a vast improvement over the old stability and may lead to the convergence of the interests of the civil rights movement with the concerns of the less affluent members of society.

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II.

Richard Epstein presents a thoughtful libertarian perspective on our article. He raises three points. First, he questions our use of black relative wages as a measure of the success of civil rights policies and suggests that "social welfare" should guide policy in this area.¹⁵ Second, he asks what lessons can be drawn from our article

14. *Paradox*, *supra* note 1, at 319.

15. *Id.* at 303-9.

concerning the proposed Civil Rights Act of 1990. On this question, he accepts our main conclusions—that civil rights legislation helped raise black relative wages in the period 1965 to 1975 and that the successes of this era have little relevance for the policy discussions of 1990. Third, Epstein claims that the observed improvement in black relative status resulted from “the effective elimination of force and fraud.”¹⁶ In his view, racial disparity can be sustained only when active government policy impedes voluntary market forces or when private, illegal, coercive activity impairs individual freedom of association and contract.

Before we consider these substantive issues, a methodological comment is in order. Epstein correctly notes that we are cautious in generalizing from the available facts. In this regard, our style is different from that of many scholars writing on law and economics who assume that theoretical predictions about the impact of the law have a precise counterpart in reality. Our approach is expressly empirical and our caution is deliberate. On a topic as controversial as the impact of civil rights legislation, it is especially important to distinguish fact from fantasy. We will make progress in law and economics only if we clearly separate fact from speculative theory and do not assume that qualitatively correct conclusions are necessarily quantitatively important. Our article presents the available empirical facts that should be the basis for an informed discussion of employment discrimination legislation. It is important to know how much discipline the available factual knowledge imposes on speculative social science theory. Our unwillingness to speculate does not betray a lack of imagination; rather, it indicates our desire to focus on what objectively can be known.¹⁷

16. *Id.* at 310.

17. In his rejoinder to our response, Epstein criticizes us for “provid[ing] no way in which to assess the incentive effects or the administrative costs of the current program of Civil Rights enforcement.” Epstein, *Postscript*, 8 YALE L. & POL’Y REV. 331 (1990). Although we share Epstein’s eagerness to analyze these economic aspects of employment discrimination law, the express purpose of our article is to assess the available empirical evidence on the effects of the law. We differ from Epstein principally in our willingness to substitute theoretical speculation for empirical analysis of these questions. Informed speculation may be the only available guide to policy formation, but we believe that it is critically important to distinguish between convincing empirical evidence and untested assertions about the supposed economic effects of the law. Epstein’s contention that the Civil Rights Act of 1990 will “expand the dislocations in the economy without any discernible payoff” falls into the latter category. *Id.*

Measures of Black Progress and Social Welfare

We agree with Epstein that using relative wages to measure black status is arbitrary. It has become a conventional measure in the economic analysis of discrimination because of the influential work of Gary Becker, who developed a demand-side theory of market discrimination in which relative wages play a prominent role.¹⁸ Alternative models suggest different measures.¹⁹

For example, black and white real income or earnings levels can be compared over time. In the 1950s, both black and white male real earnings rose while the earnings ratio remained fixed. During the 1960s and early 1970s, although black relative earnings rose, the absolute gap between the real earnings of blacks and whites increased. In the late 1970s and early 1980s, black relative earnings remained constant while real earnings for both racial groups declined. The absolute declines for both racial groups do not appear to be related in any systematic way to developments in civil rights law. The data for the period 1965 to 1975, during which black relative status improved while white absolute earnings rose, refute Epstein's conjecture that civil rights laws might have improved black relative status by reducing white absolute status.²⁰

We agree with Epstein that it would be interesting to know if society is better off with Title VII than without it. However, in this context, social welfare is an empirically meaningless concept. Epstein proposes to evaluate the success of civil rights legislation using the conventional Pareto and Hicks-Kaldor criteria.²¹ It is patently obvious that Title VII was not Pareto improving. Many white southerners resented federal interference with their way of life, and white workers stood to lose their privileged position in the labor market. The factual knowledge required to compute Kaldor-Hicks compensation measures is simply not available. As is often the case, the lack of necessary data makes welfare economics an academic curiosity of no practical value in evaluating social programs.²²

18. G. BECKER, *THE ECONOMICS OF DISCRIMINATION* (1957).

19. See Heckman, *The Impact of Government on the Economic Status of Black Americans*, in *THE QUESTION OF DISCRIMINATION: RACIAL INEQUALITY IN THE U.S. LABOR MARKET* (1989).

20. *Paradox*, *supra* note 1.

21. *Id.* at 303-9.

22. In his rejoinder, Epstein clarifies his proposed application of the Pareto welfare criterion. We understand his position to be that civil rights laws are justified if they promote the libertarian ideal of voluntary association or if they produce a Pareto improvement from the libertarian regime. *Postscript supra* note 19, at 332. The traditional Paretian approach to welfare analysis asks whether a proposed market intervention will

Even if social welfare could be evaluated, it would convey little useful information. No one seriously maintains that social policy is based on maximizing social welfare in either its Benthamite or Rawlsian form. A more realistic model of governmental decision making emphasizes rivalry among groups.²³ In this view, politically successful groups use the tax-transfer system to achieve essentially redistributive goals, incurring real resource costs in the process. Discussion of optimal social policy requires both the selection of social choice mechanisms and knowledge of the full costs of decisions made under those mechanisms. Agreement concerning ethical and economic criteria also would be required to evaluate optimal social policies.

Our ambition is more modest. The indices of welfare we use in this and other articles measure the economic gains for Blacks—the group for which employment discrimination laws were enacted. While some benefits can be identified, there are no convincing empirical estimates of the costs of civil rights legislation to employers and nonminorities. We do not deny that such costs exist or that they are relevant to social decisions about antidiscrimination legislation. In the spirit of our cautious approach, however we simply note the absence of any empirical evidence concerning their magnitude or practical importance.

Lessons for the Civil Rights Act of 1990

As stated in our article and reiterated by Epstein in his critique, the breakdown of discrimination in the South in the period 1965 to 1975 was a unique historical episode. First and foremost, the blatantly discriminatory employment practices of the segregated South were an easy target for antidiscrimination enforcement. Second, the desire of entrepreneurs to employ Blacks in their factories contributed significantly to the successes of the first decade of federal employment discrimination law.²⁴ The market-enhancing characteristic

make at least one person better off without making anyone worse off—*relative to the status quo*. If the traditional approach based on a comparison to an observable wealth distribution is empirically meaningless, then Epstein's approach—based on a comparison to a hypothetical distribution—is even less tenable.

23. See Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983).

24. See Donohue & Heckman, *Continuous Versus Episodic Change: The Impact of Affirmative Action and Civil Rights Policy on the Economic Status of Blacks*, J. ECON. PERSPECTIVES (forthcoming 1990); Heckman & Payner, *Determining the Impact of Federal Antidiscrimination Policy on the Economic Status of Blacks: A Study of South Carolina*, 79 AM. ECON. REV. 138 (1989); see also Butler, Heckman & Payner, *The Impact of the Economy and the State on the Economic Status*

of the legislation helps to explain why the gains for Blacks were so great during a period when enforcement activity was so limited. It is unlikely that such market-enhancing opportunities for civil rights law exist today. Moreover, the remaining targets for employment discrimination enforcement are far more subtle and ambiguous than the strict labor market segregation that prevailed in 1964. Accordingly, the civil rights success in the South of the 1960s has little relevance to current legal controversies concerning employment discrimination legislation.

Why Was Discrimination Maintained?

Epstein contends that "segregation retained its tenacity because it was a set of big government practices that exhibited all the excesses that only government monopolies can work."²⁵ However, he fails to establish the role of state governments in maintaining patterns of discrimination and segregation in employment. Only South Carolina had a law mandating segregation in employment, and it was confined to the textile and apparel industries. Yet similar patterns of racial exclusion prevailed in the textile industry in Virginia, North Carolina and Georgia, which lacked segregation laws. The breakthrough of Black employment observed in South Carolina textiles after 1965 also occurs in the textile industry in those states.²⁶ The South Carolina segregation law, enacted in 1915, merely ratified pre-existing practices. In fact, Black employment rose as a percent of total employment after passage of the 1915 law.

The stability of segregated employment patterns in the absence of any direct governmental action suggests that factors other than governmental coercion explain the persistence of discrimination. Little direct evidence is available concerning the mechanisms that supported segregation. We can, like Epstein, only speculate about the reasons that segregated employment patterns persisted until 1965. The southern system of racial subordination undoubtedly originated in the violence of slavery. Private violence continued to play a role, particularly in rural areas of the South. Another reason for stability was the widely shared belief that Blacks were inferior to Whites and that by virtue of their inferiority Blacks belonged in a

of Blacks, in *MARKETS IN HISTORY: ECONOMIC STUDIES OF THE PAST* 240 (D. Galenson, ed. 1989).

25. *Paradox*, *supra* note 1, at 309.

26. Butler, Heckman & Payner, *supra* note 9, at 263.

subordinate position in southern society.²⁷ Although social scientists have great difficulty in accommodating shared beliefs into their theories,²⁸ such beliefs may play an important role in accounting for many social phenomena.

In addition to speculating on the role of government in maintaining segregated employment patterns, Epstein presents an idealized and undocumented account of the operation of competitive markets. His claim that the entry of color-blind entrepreneurs would eliminate discriminatory hiring is not factually based. This is pure speculation. A different line of speculation envisions that employers confront social sanctions if they deviate from prevailing segregationist practices. The resulting market equilibrium can be robust to individual entrepreneurial deviations from the segregationist norm.²⁹ Even without social sanctions for deviance, firms still may incur sizable costs in attempting to employ Blacks. White employees' resistance to working with Blacks may make an integrated workforce impossible to maintain. Substantial fixed costs of employment make it costly to replace an all-white work force with an all-black one. Even if violence and coercive social pressures play no role, institutionalized segregation and discrimination may be costly for a solitary entrepreneur to change.

Epstein also neglects a potentially important role for interaction between discrimination in employment and discrimination in other aspects of southern life. For some industries, integration in the workplace entailed integration in schools and housing. Many southern textile plants were geographically isolated; schools, housing, and employment in the mill towns were all segregated. A marginal firm experimenting with hiring Blacks may fail to become profitable unless the government promotes the integration of other aspects of social, political and economic life.³⁰ Donohue and Heckman document that the success of Title VII in the South in the period 1965 to

27. In the early 1900s, accounts in scholarly publications describe Blacks as limited or inferior in comparison to Whites. The "sciences" of anthropology and phrenology clearly established this "fact." See A.B. HART, *THE SOUTHERN SOUTH* (1910).

28. See J. ELSTER, *THE CEMENT OF SOCIETY* (1989).

29. For a theoretical development of such a model, see Akerlof, *A Theory of Social Custom, of Which Unemployment May Be One Consequence*, 94 Q.J. ECON. 749 (1980).

30. In his rejoinder, Epstein contends that it is an historical error to believe that the southern segregationist system could have been maintained without the "coercive prop" of state power. *Postscript supra* note 19, at 331. Although segregation was certainly reinforced by the white monopoly on political power, it is a *non sequitur* to infer that political power was necessary to maintain labor market segregation. The fragmentary evidence available for the period before South Carolina enacted laws regulating the employment of blacks in the textile industry shows that black employment was low and that experiments with employing black workers were unsuccessful.

1975 was closely tied to successful programs of integration in schooling, housing and voting.³¹ Heckman and Payner observe that simultaneous federal pressure on several aspects of the segregationist system produced important spillovers in other sectors of southern society.³² Entrepreneurial experimentation was both infrequent and unsuccessful. Evidence from South Carolina *before* the advent of Jim Crow laws suggests that attempts by individual entrepreneurs to employ all-Black workforces in textiles led to financial failure in every instance. The reasons for failure are unclear.³³ Nonetheless, a central tenet of libertarian thought—that unfettered competition eliminates discrimination—remains to be empirically verified.³⁴

James J. Heckman and J. Hoult Verkerke

31. Donohue & Heckman, *supra* note 9.

32. Heckman & Payner, *supra* note 9.

33. See B. MITCHELL, *THE RISE OF THE COTTON MILLS IN THE SOUTH* (1921); G. Wright, *Segregation and Racial Wage Differentials in the South Before World War II* 10-13 (Stanford University 1989) (unpublished manuscript).

34. In his rejoinder, Epstein restates the libertarian position that "the forms of discrimination that remain in voluntary markets are not worthy of elimination by state coercion." *Postscript*, *supra* note 19, at 331. Although we appreciate the clarification, this normative position is somewhat at odds with Epstein's repeated assertion that competitive pressure is sufficient to eliminate market discrimination in wages (as distinct from eliminating market segregation). A system of segregated production without wage discrimination is a theoretical possibility, but the available empirical evidence strongly suggests that racial segregation and racial discrimination most often occur together. There was very little pure wage discrimination in the South even prior to 1964. Instead, Blacks were excluded from relatively higher paying industries and occupations. Thus, the historical record offers no support for the theory of nondiscriminatory segregation.

Postscript

It is, I think, important to make few brief comments on the replies to my paper by Heckman and Verkerke.¹

Heckman and Verkerke despair of the ability to make any constructive social recommendations on the strength of either Pareto or Kaldor-Hicks criteria. But they offer little by way of an analytical substitute, and provide no way to assess the incentive effects or the administrative costs of the current program of civil rights enforcement. Their caution therefore makes them, as best one can tell, agnostic about the Civil Rights Act of 1990, even though the statute seems to expand the dislocations in the economy without any discernible social payoff. One certainly cannot attribute any normative weight to the models of interest group politics, such as Gary Becker's,² that describe all too well how American politics operates today.

In addition, Heckman and Verkerke misconstrue the libertarian position. It is *not* a central tenet of libertarian thought to believe, as they claim, "that unfettered competition eliminates discrimination."³ Affirmative action programs are powerful evidence that it will not. And normatively, the libertarian position is that the forms of discrimination that remain in voluntary markets are not worthy of elimination by state coercion—a very different proposition indeed. The argument favors decentralized decisionmaking, and not any particular vision of the collective good.

Heckman and Verkerke also make, I believe, two mistakes in seeking to understand the Jim Crow era, one historical and one analytical. Historically, it is exceedingly unlikely that the pattern of segregation could have been maintained in the South if the segregationists did not maintain control of all organs of state and local government. The tenacity with which they resisted sharing the vote is powerful evidence that maintenance of the coercive power of the state was necessary to support their vision of culture. Without iron-clad white political control, someone, somewhere would have tried to gain entry into local markets, given the supracompetitive returns.

1. Heckman & Verkerke, *Responses to Epstein*, 8 YALE L. & POL'Y REV. 320,324 (1990) [hereinafter cited *Response*].

2. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983).

3. *Response supra* 1, at 330.

To call this historical pattern of social and cultural practices is to ignore or to understate the coercive prop'ion which the whole system depended. Do Heckman and Verkerke believe that Jim Crow could have survived if black majorities held political power?

Analytically, I think the Yale duo are wrong to insist that any change from Jim Crow to an open economy must be a Pareto improvement to be justified.⁴ As I noted in my article, where strong libertarian arguments against a current set of legal rules, then rectification is in order, and rectification never leaves those who are responsible as well off afterwards as they were before. The question of Pareto improvement must be asked from the accepted libertarian baseline: can one think of a way in which Jim Crow is either a Pareto or a Kaldor-Hicks improvement over a system of open and competitive markets? As cautious as they are, I'll bet that neither Heckman nor Verkerke would maintain that position if forced to abandon their methodology modesty.

Richard A. Epstein

4. *Id.* at 326.